

ASUC Judicial Council

Summary Judgment

Ickowitz-Freeman vs. ASUC Senate and Senate Bill 160

On this date, the Seventeenth of May, Two Thousand and Thirteen,

By Associate Justice Alexandra Clarke, with whom
Senior Associate Justices Stephanie Chamberlain, Scott Lara, Emrin Dhatt,
and Associate Justices Vishaal Pegany, Ahmad Kasfy, and Nicolette Roger join

I. Background

In the case of *Ickowitz-Freeman vs. ASUC Senate and Senate Bill 160*, the Judicial Council was asked to consider the legality of ASUC Senate Bill (SB) 160.

In the hearing, ASUC Senate was not represented in the case and Mr. Nolan Pack served as spokesperson on behalf of Senate Bill (SB) 160. SB 160 passed on April 18, 2013, by a vote of 11-9-0. The bill calls for the divestment of ASUC funds from specified companies and those that fit the following criteria:

- a. provide weaponry or other military support for the occupation of the Palestinian territories;
or
- b. facilitate the building or maintenance of the wall or the demolition of Palestinian homes; or
- c. facilitate the building, maintenance, or economic development of illegal Israeli settlements on the Occupied Palestinian Territory

Furthermore, SB 160 directs the ASUC to advocate that the University of California (UC) also divest funds from companies meeting the abovementioned criteria.

In accepting the case, the Judicial Council renders a decision on the constitutionality of SB 160. This decision does not affirm nor reject the merits of divestment practices and policies.

II. Introduction of the Arguments

The Plaintiff, Mr. Ickowitz, states that in passing SB 160 the ASUC Senate violated several procedures in both the ASUC Constitution and By-Laws:

1. SB 160 required a 2/3 vote of the Senate
 - o Violates ASUC Constitution, Article VI, Section 1, Clause C;
2. SB 160 usurps the authority and function of the ASUC Investment Committee
 - o Violates ASUC By-Laws, Title III, Article X, Section 10, Clause 4;
3. SB 160 does not amend the By-Laws to specify its restrictions on ASUC funds.
 - o Violates ASUC Constitution, Article VI, Section 8, Clause A
4. SB 160 was not reviewed by the Constitutional and Procedural Review Committee
 - o Violates ASUC By-Laws Title I, Article VII, Section 7, Clause 9, Item 2.

In representing SB 160, Mr. Pack discusses the way investments are not part of the ASUC budget and therefore not subject to the ASUC Constitution and By-Laws. Following is a summary of arguments made in the Defense's brief:

1. SB 160 is not an appropriation
2. SB 160 is not a revenue reduction
3. SB 160 does not set up "unconstitutional triggers"
4. SB 160 is/was not required to go through the Investment Committee
5. SB 160 is/was not required to go through the Constitutional and Procedural Review Committee

III. Examination of the Arguments

The Judicial Council unanimously agrees that ASUC investments in the Boston Trust & Investment Management Company (Boston Trust) are a source of ASUC funds; however, we believe investments possess characteristics inherently distinct from the ASUC operating budget. Unlike the operating budget, Mr. Pack stated, the ASUC Senate has no knowledge of the day-to-day investing practices of the Boston Trust. Investing is a complicated practice, and specific expertise is required in order to successfully invest a large sum of money as the ASUC has. Recognizing its own capacity, the ASUC turned over investments to the Boston Trust. Furthermore, investment dividends are not included in the ASUC Budget and are not viewed by the ASUC as revenue. As such, the divestment practices in SB 160 represent neither a revenue reduction nor an appropriation. Therefore, SB 160 did not require a two-thirds majority needed for legislation enacting a revenue reduction or appropriation.¹

This is not to say that the investments in the Boston Trust are insignificant in the scope of ASUC funds. According to Financial By-Laws, ASUC must transfer 15 percent “of any money entering the Commercial Revenue Holding Fund” to the Long Term Investment Fund in order, “to ensure the financial future of the ASUC.”² Additionally, since the passage of ASUC Senate Bill 65 in 2010, “the ASUC shall make a grant on or about June 30, 2010, of all interest accumulated in its account with Boston Trust & Investment Management Company up to a maximum of \$40,000 per annum for the purpose of funding future scholarships to students attending the University of California, Berkeley through (Berkeley Student Foundation) BSF.”

Due to the unique nature of investments, SB 160 does not fall within the scope of the ASUC Budget. Furthermore, the By-Laws overseeing investments do not fall under the Finance Committee as do those detailing other spending and financial allocation issues. However, investments with the Boston Trust are central to the financial sustainability of the ASUC, as well as to the education of UC Berkeley students through the Berkeley Student Foundation. It is crucial that all pieces of legislation dealing with these investments go through all proper legislative procedures as outlined by the ASUC Constitution and By-Laws. The Constitution supersedes the By-Laws, yet the Constitution only specifically mentions investment in two instances. Neither of these provisions is applicable to the constitutionality of SB 160. Thus, we turn to the By-Laws.

According to Title III, Article X, the ASUC Investment Committee shall handle investment decisions. Specifically, the Investment Committee

“Shall oversee all cash and cash equivalents and general investments held by the ASUC... The committee shall be further charged with developing and maintaining a written investment policy encompassing the values by which the ASUC conducts its official business.”

The Investment Committee has clear authority to oversee investments and maintain a written investment policy. The members of said committee must all have “sufficient qualifications and education.” Furthermore, according to Article X, Section 2, Clause 4, there are three faculty members appointed by the ASUC President “with preference given to those with expertise in investment.” The fact that the authority to craft investment policy was delegated to a committee with specific expertise requirements aligns with the Council’s viewpoint on the unique nature of handling investments.

While the ASUC Investment Committee must operate within the values of the ASUC, they are not required to take directives from the ASUC. SB 160 both expresses values and simultaneously issues explicit directives. SB 160 is written in such a way that the Investment Committee has no choice but to follow the directives. SB 160 usurps the power of the Investment Committee and places the authority to make company-level investment decisions in the hands of the ASUC Senate, a body that lacks the authority and expertise to make such decisions.

In summary, the ASUC Senate has no constitutional power to craft specific investment policies. Due to the fact that the success of ASUC investments is central to the long-term viability of the ASUC and to the education of students, it is crucial those with expertise handle these investments. That is why the By-Laws give investment policy authority to the Investment Committee. The ASUC delegated control to a third-party, the Boston Trust, and the ASUC Senate has no role in the day-to-day investment decisions made by said fund. According to the By-Laws, the only body in the ASUC with the authority and expertise to write investment policy is the Investment Committee. Thus, when the ASUC specified companies by name and issued strict directives such as “will divest” in SB 160, it overstepped its legislative bounds.

¹ Constitution Article VI Section I Clause C.

² Title III Article VIII Section 1 Clause 1.

IV. Conclusion and Decision

Due to the specific nature of investments and the policy-making authority delegated to the ASUC Investment Committee, SB 160 unlawfully exceeds its authority given to the Senate by the Constitution and By-Laws of the ASUC. Appendix A contains the unlawful language stricken by the Council.

Appendix A

A Bill In Support of Human Rights in the West Bank and Gaza Strip

Authored By Senator George Kadifa

Sponsored By Senator Sadia Saifuddin and Senator George Kadifa

WHEREAS, UC Berkeley's "Principles of Community" are intended to serve "as a guide for our personal and collective behavior, both on campus and as we serve society [1];" and,

WHEREAS, as outlined in UC Berkeley's Principles of Community "we (UC Berkeley) believe that active participation and leadership in addressing the most pressing issues facing our local and global communities are central to our educational mission [1];" and,

WHEREAS, as further outlined in UC Berkeley's Principles of Community, it is UC Berkeley's duty to maintain the values of "honesty, integrity, diversity, and excellence" and "strive to uphold a just community in which discrimination and hate are not tolerated [1];" and,

WHEREAS, UC students have a legacy of standing against oppression and injustice at UC Berkeley and across the U.S.; and,

WHEREAS, the role of student activists in exposing South Africa's apartheid system and supporting equality, freedom, and dignity sets an example for us to follow as students of global conscience; and,

WHEREAS, as the example of South Africa shows, it is imperative for students to stand unequivocally against all forms of racism and bigotry globally and on campus, including but not limited to Islamophobia, anti-Semitism, and the anti-Palestinian discrimination practiced under Israel's system of illegal occupation in the West Bank, Gaza, and East Jerusalem; and,

WHEREAS, the Occupied Palestinian Territories are controlled militarily by the Israeli government [2]; and,

WHEREAS, Israeli government violations of human rights and international law have been recognized and condemned by the international community including by the UN General Assembly in dozens of resolutions (i.e., 259, 316, 446, 452, 465, 468-469, 471, 476, 592, 605, 607, 608, 636, 641, 672, 673, 681, 694, 726, 799, etc.); by the UN Security Council; by the International Court of Justice's 2004 Advisory Opinion on the Route of the Separation Barrier in the West Bank; and by the Human Rights Council Fact-Finding Mission to Gaza, among others; and,

WHEREAS, certain companies have promoted and been complicit in many of the ongoing human rights violations systematically committed by the Israeli government, which have been documented by human rights organizations including Amnesty International, Human Rights

Watch, Defence for Children International, B'tselem, Adalah, Physicians for Human Rights, and the Israeli Committee Against House Demolitions; and,

WHEREAS, these ongoing human rights violations and violations of international law are recognized to include the following; and,

WHEREAS, according to the International Court of Justice's (ICJ) 2004 ruling, the creation and use of the Separation Wall to expropriate Palestinian lands is illegal under international law [3]; and,

WHEREAS, according to the same ICJ decision, the establishment and expansion of settlements in the West Bank and East Jerusalem is also illegal under international law [4]; and,

A Bill In Support of Human Rights in the West Bank and Gaza Strip (cont'd)

WHEREAS, under the Fourth Geneva Convention, UN GA ES-10/6, and other UN resolutions, the establishment and expansion of settlements in the West Bank and East Jerusalem is in violation of international law [5]; and,

WHEREAS, according to US policy, “the legitimacy of continued settlement activity” has not been accepted by any US administration, and, as recently as December, the Obama administration chose to “reiterate our long standing opposition to Israeli settlement activity”[6]; and,

WHEREAS, according to the United Nations’ Special Rapporteur on Human Rights in Palestinian Territories, John Dugard, “the Occupied Palestinian Territory [is] of special concern to the international community” because “the international community, speaking through the United Nations, has identified three regimes as inimical to human rights - colonialism, apartheid and foreign occupation. Numerous resolutions of the General Assembly of the United Nations testify to this. Israel’s occupation of the West Bank, Gaza and East Jerusalem contains elements of all three of these regimes” [6.5]; and,

WHEREAS, Israel’s systematic violations of Palestinian rights to property, freedom of movement, due process, freedom of assembly, freedom from discrimination, and other basic rights enshrined in the UN Declaration of Human Rights, have been further delineated via extensive documentation by respected human rights organizations such as Amnesty International, Human Rights Watch, and B’tselem; and,

WHEREAS, our university invests in, and thereby profits from, companies that have an active role in materially aiding Israel’s illegal occupation and the resulting human rights abuses, thereby making it a complicit third-party; and,

WHEREAS, among others, these investments include \$5,390,073 in investments in Caterpillar Incorporated, \$7,477,533 in investments in Cement Roadstone Holdings, and \$2,042,208 in investments in Hewlett Packard according to the most recent UC Retirement Program and UC

General Endowment Fund annual holdings reports available on the official Treasurer of the Regents website [6.7]; and,

WHEREAS, Caterpillar, an American company, has helped sustain the illegal occupation by providing bulldozers and engineering tools used to destroy Palestinian homes and farmland, expand illegal Jewish-only settlements on the confiscated Palestinian land, and assault refugee camps in violation of international humanitarian law, as documented by the United Nations, Amnesty International, and Human Rights Watch [8-9]; and,

WHEREAS, Cement Roadstone Holding (CRH), an Irish company, has contributed to Israel’s illegal occupation through its partial ownership in Mashav, the distributor of Liebherr earth-moving and heavy construction equipment used in illegal settlement and Separation Wall construction, and is the supplier of cement and other building materials used in the construction of the Separation Wall and settlement infrastructure [10]; and,

WHEREAS, Hewlett-Packard Company (HP) has supported restricting the freedom of movement of the Palestinian peoples within the West Bank by providing biometric identification systems used in the Israeli military checkpoints; and,

WHEREAS, these companies have been previously engaged by various human rights organizations, churches, and concerned investors about their complicity in the previously mentioned human rights violations of the Palestinian people [11]; and,

WHEREAS, in particular, Amnesty International demanded in 2004 that “Caterpillar Inc., the US company which produces the bulldozers used by the Israeli army, should take measures – within the company sphere of influence – to guarantee that its bulldozers are not used to commit human rights violations, including the destruction of homes, land and other properties,” and, “should adopt a code of conduct which complies with the UN Human Rights Norms for Business and should respect and ensure the application of Article 3 of the UN Norms, which states that Trans National Corporations and other business enterprises shall not engage in, nor benefit from, war crimes, crimes against humanity and other violation of international humanitarian law”[11.5]; and,

WHEREAS Caterpillar has ignored similar calls from Human Rights Watch, the United Nations High Commissioner for Human Rights, and the Presbyterian Church USA to end its complicity in the illegal demolition of Palestinian homes [12]; and,

A Bill In Support of Human Rights in the West Bank and Gaza Strip (cont'd)

WHEREAS, Cement Roadstone Holdings was approached by Amnesty International in 2004 regarding its investments aiding Israel's illegal occupation, with Amnesty making clear that "the construction by Israel of the fence/wall inside the Occupied Territories violates international law and is contributing to grave human rights violations" [13]; and,

WHEREAS, Hewlett Packard has been approached by faith leaders and human rights groups via letters, conference calls, e-mails, face-to-face meetings and shareholder resolutions regarding the use of its products in the infrastructure of Israel's occupation and violation of Palestinian freedom of movement; and,

WHEREAS, these companies have chosen to disregard these entreaties to be more socially responsible corporate actors and have instead knowingly continued to sell their products to the Israeli military as it violates international law and Palestinian human rights through its illegal occupation; and,

WHEREAS, UCB students enjoy peace of mind knowing that their university is barred by federal law from making investments that aid Palestinian militant organizations which engage in attacks that threaten the human rights of Israeli students and their families; and,

WHEREAS UCB students are not able to enjoy the same peace of mind with respect to investments that threaten the human rights of Palestinian students and their families as our university profits from the human rights abuses visited upon these students and their families in the course of Israel's illegal occupation; and,

WHEREAS, any attack directed at Israeli, Palestinian, or any other civilians is unacceptable; and,

WHEREAS, the University of California does not currently take a neutral position on the occupation of the Palestinian Territories, as it is invested in such companies profiting from the violation of Palestinian human rights; and,

WHEREAS, corporate social responsibility divestment campaigns present a nonviolent and ethical form of challenging systemic injustices, and have been requested by Palestinian civil society [19]; and,

WHEREAS, the ASUC has a long tradition of pursuing socially responsible investment in other areas, targeting South African apartheid, removing funds from Sudan over the conflict in Darfur, unanimously supporting divestment from fossil fuel producers, and most recently endorsing a proposal to divest from the prison-industrial complex; and,

WHEREAS, the UC Regents have similarly established a record of ethical divestment, including divesting from South Africa under apartheid, Sudan over the conflict in Darfur, and, most recently, from the firearms manufacturer Bushmaster; and,

WHEREAS, pension fund giant TIAA-CREF removed \$72,943,861 worth of Caterpillar shares from its Social Choice Funds portfolio in June 2012, after a sustained campaign spearheaded by Jewish Voice for Peace and other collaborating organizations, asking TIAA-CREF to remove its investments in Caterpillar and other companies that profit from and materially support Israel's illegal occupation [14]; and,

WHEREAS, on November 13th, 2012, the Associated Students at UCI passed a resolution, "Divestment from Companies that Profit from Apartheid," by a unanimous vote; and,

WHEREAS, on March 14, 2013, the Associated Students at UCSD passed a resolution, "Resolution in Support of University of California San Diego Corporate Accountability through Divestment from Corporations Profiting from the Illegal Occupation, Siege, and Blockade of Palestine;" and,

WHEREAS, as American residents, our tax dollars go to providing Israel an average of \$3.1 billion in military aid annually, helping to make Israel the largest cumulative recipient of U.S. foreign military assistance since World War II, creating a special responsibility among Americans for Israel's illegal military occupation; and, [15]

WHEREAS, while agreeing with the tactic of targeted, specific divestment, linguist and political activist Noam Chomsky, who was involved in divestment from South African apartheid as well as the divestment from the Vietnam War, has pointed out that, "it's [the BDS movement] not a call from the Palestinian people... in fact it's been hard enough to try to

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get the Palestinian people to boycott settlement products” and “U.S. support for Israel, which is decisive, is a fraction of U.S. crimes,” pointing out that the obligation to condemn out own governments support for the atrocities [16]; and,

WHEREAS, political scientist, activist, and author Norman Finkelstein has pointed out that “the settlements are illegal...East Jerusalem is occupied Palestinian territory... the West Bank and Gaza are occupied Palestinian territory...but it is also correct that Israel is a state...if you want to use the law as a weapon or as leverage in order to reach the public opinion, you can’t be selective with the law...the law is a packaged deal [17];” and,

WHEREAS, the ASUC acknowledges the human rights violations committed by other states, particularly the United States of America, and makes a commitment to targeted, specific divestment from all human rights violations, with no discrimination based on what state is committing the atrocities; and,

WHEREAS, no part of this bill should be considered or misconstrued as support for any advocacy external to this bill; and

WHEREAS, despite agreeing on certain issues, the ASUC does not support Omar Barghouti, the leader of the Boycott, Divestment, and Sanctions (BDS), and his end goal of a one-state solution that would replace the state of Israel; and,

WHEREAS, the longstanding occupation has not only been characterized by Palestinian suffering, but by the loss of 129 Israeli minors killed since 2000, whose common humanity we acknowledge and whose deaths seriously impact members of our campus community, just as the deaths of 1,337 Palestinian minors killed since 2000 does; and

WHEREAS, we acknowledge the right to self determination of both the Jewish and Palestinian peoples when done in a way that respects the equal rights of all people living in Israel and Palestine, maintaining a neutral position and endorsing neither a one state or two state solution

WHEREAS, both Israelis and Palestinians have the right to defend themselves against violence, but they should do so in a way that respects the human rights of civilians

WHEREAS, Besides supporting divestment from companies complicit in human rights violations, the BDS movement represents a wide range of views regarding larger scale solutions to peace in the Middle East. This particular bill is in no way endorsing any such views, particularly regarding a one-state vs. two-state solution. This is a far more complicated issue and not one that the ASUC is taking a stance on. Divestment is solely a tactic being used in support of justice and human rights, and should in no way be misconstrued as support for any other goals or beliefs related to the BDS movement and their leaders.

WHEREAS, the BDS movement calls on a cultural and academic boycott, which hurts more people than just policymakers, is counterproductive to academic and cultural growth, and is an inherently different tactic than divesting from companies directly involved with human rights violations.^{[1][2]}

WHEREAS, newspapers that label this bill as divestment from Israel should be considered misleading as it does not seek to divest from the country as a whole and endorses no such action; and,

THEREFORE BE IT RESOLVED, that the ASUC should not be construed to support a significant portion of the BDS movement including but not limited to their call for an academic and cultural boycott of Israel and the strong undertones essentially calling for a one state solution.^[3]

THEREFORE BE IT RESOLVED, that the ASUC President author an open letter to the public explaining that this bill in no way divest from the state of Israel and should not be labeled as “Israeli divestment”.

THEREFORE BE IT RESOLVED, that while the ASUC supports specific and targeted divestment from companies contributing to human rights violations, they also support international law stipulating Israel’s right to be a state [18] with equal rights for all its citizens; and,

BE IT FURTHER RESOLVED, that the ASUC will examine its assets and UC assets for funds being invested in companies that a) provide weaponry or other military support for the occupation of the Palestinian territories or b)

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facilitate the building or maintenance of the wall or the demolition of Palestinian homes, or c) facilitate the building, maintenance, or economic development of illegal Israeli settlements on the Occupied Palestinian Territory; and,

BE IT FURTHER RESOLVED, in addition to targeted divestment of funds that the ASUC will instruct the managers of the Boston Trust to seek investment opportunities that strengthen Israeli-Palestinian cooperation in the pursuit of a peaceful resolution to the conflict; and,

BE IT FURTHER RESOLVED, that the ASUC calls upon the EAVP to write a letter to Senators Feinstein and Boxer and Congresswoman Lee expressing this bill's sentiments and encouraging them to publicly support the views espoused within, and to write a letter to the student governments of the other University of California campuses suggesting they adopt a similar resolution; and,

BE IT FURTHER RESOLVED, that if at any time it is found that campus or UC funds are being invested in any companies meeting any of these criteria, including Caterpillar, Cement Roadstone Holdings, and Hewlett Packard Company the ASUC will itself divest, and will advocate that the UC system divest, all stocks and investments in such companies with the goal of maintaining the divestment, in the case of said companies, until they cease the specific offending practices; moreover, the ASUC will not make further investments, and will advocate that the UC system not make further investments, in any companies materially supporting or profiting from Israel's occupation in the above-mentioned ways, until a point in time at which they cease such practices; and,

BE IT FURTHER RESOLVED, that if at any time ASUC funds or UC funds are found to be invested in companies profiting from organizations that target civilians be they Palestinian, Israeli or otherwise, the ASUC and the UC system should follow similar steps as outlined in the prior clause and divest those funds; and,

BE IT FINALLY RESOLVED, the ASUC calls upon the EAVP to write a letter containing a copy of this resolution to other student governments throughout the UC system and recommend that they adopt a similar bill.